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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 474

BURT CAIN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals
(R. 326-331) is reported at 156 F. 2d 8.

JURISDICTION

The judgment of the circuit court of appeals
was entered May 16, 1946 (R. 332), and a petition
for rehearing was denied July 16, 1946 (R. 333).
On August 6, 1946, the Chief Justice extended
the time for filing a petition for a writ of certio-
rari to September 14, 1946. The petition for

a writ of certiorari was filed September 7, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the indictment is duplicitous.
2. Whether the indictment charges that the defendants jointly committed substantive offenses, rather than that they conspired to commit such offenses.
3. Whether there was a fatal variance between the indictment and the proof.
4. Whether the evidence is sufficient to support the finding that petitioner joined the conspiracy charged in the indictment.

STATUTES AND REGULATIONS INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat.

23; 58 Stat. 632; 50 U. S. C. App., Supp. V, 901 *et seq.*), read as follows:

SEC. 4 (a) (50 U. S. C. App., Supp. V, 904 (a)). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity * * * in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 205 (b) (50 U. S. C. App., Supp. V, 925 (b)). Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Maximum Price Regulation No. 445, which established maximum prices for distilled spirits and wines, is printed at 8 F. R. 11161-11174.

STATEMENT

A single count indictment was returned in the District Court for the Northern District of California on December 20, 1944, charging that petitioner and Charles Malaby, Nathan Newman,

W. O. Files, R. H. Shaffer, Oscar R. Lowenthal, and Primo Rocco "did * * * conspire and agree * * * to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code, Appendix, Sections 904a-925, by wilfully selling and delivering and by wilfully offering to sell and deliver, * * * distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator * * *." Nine overt acts in furtherance of the conspiracy were set out, the first of which was alleged to have been committed March 10, 1944, and the last, May 24, 1944. (R. 2-4.) After a trial before the court without a jury, petitioner, Newman, Files, Shaffer, and Lowenthal were found guilty (R. 13-14).¹ These defendants then moved in arrest of judgment on the ground that the indictment "does not state facts sufficient to constitute a violation of Title 18, United States Code, Section 88, a conspiracy to violate title 50 to the United States Code, Appendix Section 904a-925"; the motions were denied (R. 315-317). Petitioner and Newman were each sentenced to imprisonment for one year and a day and to pay a fine of \$10,000 (R. 14, 17, 22-25, 317). Files, Shaffer, and Lowenthal were each sentenced to imprisonment for nine

¹ Malaby pleaded guilty and the case was severed as to Rocco (R. 10). It appears that Rocco subsequently pleaded guilty (see R. 326).

months and to pay a fine of \$5,000 (R. 15-16, 18-21, 317). Petitioner, together with Newman, Files, and Shaffer, appealed to the Circuit Court of Appeals for the Ninth Circuit, and the judgments of conviction were affirmed (R. 326-332).

The evidence bearing upon petitioner's contentions may be summarized as follows:

In the spring of 1944, numerous tavern keepers in California entered into contracts to purchase whiskey through the defendants Malaby and Lowenthal at prices in excess of the applicable ceiling prices. The whiskey was to be delivered by the International Import Company (R. 86-92, 93-95, 99, 100-101, 102-103, 104-110, 117-118, 118-121, 121-123, 124-126, 130-132, 132-135, 137-138, 141-142, 143-145, 145-146, 149, 150-153, 154-155, 156-157, 160-162, 164-167, 168-171, 174-176).

Malaby, who had pleaded guilty (R. 183), testified on behalf of the Government that in January 1944, he had spoken to defendant Nathan Newman in Los Angeles about "going into the whiskey business." They intended to sell whiskey at over ceiling prices. Morris Newman, Nathan's brother, stated that he "could go back east and get some whiskey." (R. 186, 188, 213, 233-234.) Malaby and the Newmans then went to San Francisco to see whether they could secure the services of a wholesaler to handle the whiskey they hoped to obtain from the east. In this connection, they

met defendant Shaffer, who looked around for a wholesaler. In February they arranged to sell to two persons a large quantity of whiskey at prices in excess of the ceiling prices. These persons agreed to deposit in escrow the portion of the price in excess of the ceiling price, and Shaffer obtained the services of the defendant Files to act as an escrow holder for a commission. Some \$16,500 was deposited by the proposed purchasers (R. 192), and this was used by the conspirators to finance their operations. (R. 187-190.)

After these transactions, Nathan Newman telephoned Malaby from Los Angeles in March and told Malaby that he had secured a wholesaler in Los Angeles. Malaby then went to the office of the International Import Company in Los Angeles, where Newman introduced him to petitioner. Petitioner said that he had "heard a lot about" Malaby. The next day Malaby returned and asked petitioner to give him "two letters of credentials, to show people that I was representing International Import Company." Petitioner gave him such letters on March 22. Malaby testified that petitioner "was familiar" with the fact that there had already been collected the portion of the purchase price in excess of the ceiling price in two transactions; that he also discussed with petitioner "the fact that Morrie Newman had contacted the Midvalley Distillery

back east, and we were going to buy a franchise from them * * * to handle their liquor in * * * California, and I was to come back up north and sell the liquor * * *. The overage that was collected was supposed to be sent down to the office in Los Angeles * * *." (R. 191-193, 200.) Malaby also testified that he discussed with petitioner the prices at which he (Malaby) had been soliciting orders; "I told him I was getting \$55 to \$57 a case and that maybe I could get \$60, and he said that was fine, but to be careful" (R. 194). Following these conversations, Malaby returned to San Francisco with the credential letters, and also with order blanks which petitioner had given him. There he continued "in the same line of activity as theretofore." (R. 194-195.) He testified that he went to Los Angeles every few weeks and on those occasions discussed with petitioner the "amounts of overage that had been collected" (R. 200, 213; see also R. 218-220, 224).

Malaby testified further that petitioner discharged him about July 18, 1944. In this connection, petitioner told Malaby that the "ATU was checking up and it was going to look bad for him [petitioner], and that we had to keep him in the clear; and it would be better if he wrote me a letter and asked me to resign until this trouble was over." (R. 217.)

Petitioner testified that he had been engaged in the wholesale liquor business under the name of the International Import Company; that he had obtained a wholesaler's license on March 6, 1944; that he had a talk with the Newmans in "the middle of March" concerning the sale of whiskey to be obtained from the Midvalley Distilling Corporation; and that subsequently he ordered a car of whiskey from that corporation (R. 270-271, 279). He employed Nathan Newman as sales manager and Malaby as a commission salesman (R. 271). Petitioner denied that he knew anything about the scheme to sell the whiskey at illegal prices, that he ever had any conversation with Newman or Malaby on the subject, and that he ever received any "overage" (R. 271, 275, 277, 282, 288-289). He testified that as soon as he learned that the whiskey was being sold at illegal prices, he questioned Malaby, and discharged him (R. 272-273, 275).

ARGUMENT

1. Petitioner contends (Pet. 6-7, 19, 21-23) that the indictment is duplicitous for the reason that it charges a conspiracy to violate more than a single section of the Emergency Price Control Act. The contention rests on the language of the indictment that the defendants conspired to violate "Title 50 United States Code, Appendix, Sections 904a-925, by wilfully selling and deliver-

ing and by wilfully offering to sell and deliver" whiskey at prices above the applicable maximum prices (R. 2). Petitioner's argument is that this language charges a conspiracy to violate each section from section 904 (a) through section 925, or, at the minimum, sections 904 (a) and 925. This contention is frivolous. In the first place, it is clear that the indictment charges only a conspiracy to commit acts which are made unlawful by section 904 (a); the allegation is that the objective offenses contemplated by the conspiracy were, in the language of that section, to sell and deliver and to offer to sell and deliver whiskey at overceiling prices. The citation of section 925 is merely a reference to the section of the Act which prescribes the penalties for acts and conduct prohibited by section 904. Moreover, an indictment charging in a single count a conspiracy to commit several crimes is not duplicitous, since the conspiracy is one crime, however diverse its objects. *Braverman v. United States*, 317 U. S. 49, 54, and cases cited.

2. The contention is also advanced (Pet. 9-10, 20, 40-48) that the indictment must be construed as charging only the joint commission of substantive offenses rather than a conspiracy, the argument being that "the charge is that the defendants formed the conspiracy *by* selling and delivering and *by* offering to sell and deliver. There is no charge of any continuing conspiracy.

When the selling and delivering or the offering to sell and deliver occurred, the substantive offense (a misdemeanor) was actually committed; *it could not be a conspiracy to commit, but a joint participation in the commission of the substantive offense.*" (Pet. 44-45; italics as in the petition.)

We submit that a fair reading of the indictment, in the light of well-settled principles, negatives the construction urged by petitioner. An indictment charging a conspiracy to violate a criminal statute is sufficient if it alleges the conspiracy in the language of Section 37 of the Criminal Code and contains such a description of the object of the conspiracy as fairly and reasonably informs the defendants of the character of the offense involved. *Culp v. United States*, 131 F. 2d 93, 99 (C. C. A. 8); *Miller v. United States*, 125 F. 2d 517, 518 (C. C. A. 6), certiorari denied, 316 U. S. 687; *Pullin v. United States*, 104 F. 2d 57 (C. C. A. 5), certiorari denied, 308 U. S. 552; *Beland v. United States*, 100 F. 2d 289 (C. C. A. 5), certiorari denied, 306 U. S. 636; *Center v. United States*, 96 F. 2d 127 (C. C. A. 4); *Hill v. United States*, 42 F. 2d 812 (C. C. A. 4), certiorari denied, 282 U. S. 884; *Jelke v. United States*, 255 Fed. 264, 275 (C. C. A. 7). And the details of the plan whereby the law is to be violated need not be set forth. *Pierce v. United States*, 252 U. S. 239, 243-244; *Haynes v. United States*, 4 F. 2d 889 (C. C. A. 2), certiorari denied, 268

U. S. 703. It is plain that the words "by wilfully selling and delivering and by wilfully offering to sell and deliver," following, as they do, the words "conspire * * * to commit offenses against the laws of the United States, to-wit, offenses in violation of Title 50 United States Code, Appendix, Sections 904a-925,"² merely serve to describe the objects of the conspiracy and to inform the defendants of the character of the offense with which they were charged. Since the prosecution was not required to allege the manner in which the defendants conspired, it certainly cannot be said that the use of the words relied upon by petitioner shows that the conspiracy charge was based upon the proposition that the defendants were guilty of conspiracy only because they acted together in the commission of a substantive offense.

3. The further contention is made, as we understand it (Pet. 7-9, 19-20, 23-40), that there is a fatal variance between the indictment and the proof in that the indictment alleged, in effect, a conspiracy formed prior to March 10, 1944, whereas the proof showed that petitioner, if he did become a member of the conspiracy, did not do so

² To sell or deliver any commodity in violation of a price regulation, or to offer to do so, are offenses in violation of section 4 (a) of the Emergency Price Control Act, 50 U. S. C. App., Supp. V, 904 (a), *supra*, p. 3.

until after that date (see pp. 5-7, *supra*);³ he argues that "To make evidence admissible that [he] became a member of the conspiracy after it was formed, the indictment must so allege" (Pet. 35). The Government was not required, however, to show that petitioner was a member of the conspiracy at its inception, for, as petitioner concedes (Pet. 35), he would be guilty if the Government established that he joined it thereafter. See, e. g., *Deacon v. United States*, 124 F. 2d 352, 358-359 (C. C. A. 1); *United States v. Harding*, 81 F. 2d 563, 566-567 (App. D. C.); *Dowdy v. United States*, 46 F. 2d 417, 423 (C. C. A. 4); *Rudner v. United States*, 281 Fed. 516, 519-520 (C. C. A. 6), certiorari denied, 260 U. S. 734. And, as said in *United States v. Harding*, *supra*, at 566: "It is not essential, in charging conspiracy, to show that all of the conspirators participated in the conspiracy at its beginning." It would seem plain that the time petitioner entered the conspiracy was not a matter of pleading, but one of evidence, and that, accordingly, the Government was entitled to prove that petitioner entered the conspiracy after it was formed, without any allegation in the indictment to that effect.

4. Petitioner's final contention (Pet. 6, 10-13, 20, 49-52) is that the evidence is insufficient to

³ The indictment (R. 2-4) does not specifically allege the date when the conspiracy was formed. The earliest overt act alleged occurred on March 10, 1944 (R. 3).

show that he joined the conspiracy. Two courts have found that the evidence was sufficient in this respect, and, under the circumstances, there is no occasion for further review by this Court. *United States v. Johnson*, 319 U. S. 503, 518; *Delaney v. United States*, 263 U. S. 586, 590. But, in any event, the evidence in this regard, which is summarized in the Statement, *supra*, pp. 5-7, is clearly adequate to support the finding that petitioner joined the conspiracy; as the court below said in this connection, the contention "can hardly be taken seriously" (R. 331). Malaby's testimony was direct evidence that petitioner knew of the scheme to sell whiskey at illegal prices, and that, with such knowledge, he became an active participant in the scheme. While petitioner testified to the contrary, the trier of the facts was, of course, free to disbelieve his testimony and to believe the testimony of Malaby.⁴

⁴ The claim (Pet. 52-55) that the testimony of the purchasers (*supra*, p. 5) was admitted against petitioner on the theory that they were conspirators themselves is clearly without support in the record. As the court below said, "There is no warrant in the record for so broad a statement. The theory was suggested by government counsel only once, when a purchaser was asked concerning his knowledge of price ceilings, i. e., that he knew an illegal transaction was being negotiated [see R. 112]. At all other times evidence of conversations with purchasers was admitted under the theory that it was evidence of the acts of a defendant committed in furtherance of the conspiracy during its existence and subject to a motion to strike 'if not connected up'" [see, e. g., R. 87, 89, 97, 105] (R. 330).

CONCLUSION

The case was correctly decided below. There are no questions of importance or conflict of decisions involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

/ J. HOWARD MCGRATH,
Solicitor General.

/ THERON L. CAUDLE,
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/ ROBERT S. ERDAHL,
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OCTOBER 1946.